

**GERMANY'S CONSTITUTIONAL COURT
AND
FUTURE GERMAN COMBAT OPERATIONS
OUTSIDE OF EUROPE**

by

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Introduction

No German soldier or airman fought in the 1991 Gulf War coalition. No U.S. or allied effort to coax Germany to share the combat burdens of providing world wide security in the post-Cold War succeeded. In fact, since World War II German units have been constitutionally forbidden from operating outside of Europe; or, so most Germans believed.

In 1994, the perceived restriction disappeared permitting Germany to participate in future international missions around the world. What changed? Did the new challenges of the post-Cold War awaken the German people to the need to change the constitution so that Germany could fulfill the role of a great power? Should one expect Germany to leap to the front of the queue of nations supplying military forces to the UN operations? The answers lie in German law and German politics. This paper explains the decision that changed German policy and suggests future implications.

For years a restrictive conception of the German Basic law regarded any international missions by German armed forces exceeding common self defense within the NATO or the Western European Union (WEU)¹ geographical area as contrary to the constitution. On the other hand most constitutional lawyers supported a more extensive interpretation of the Basic Law differentiating between national or collective defense and other international missions even outside NATO territory.² This situation gave rise to ardent controversies whenever German forces were employed outside NATO territory to fulfill UN missions.³ The latest operations of the German military in Somalia, in the Adriatic, and even on NATO AWACS flights over the former Yugoslavia prompted two political parties to go to the Federal Constitutional Court⁴ to settle the matter once and for all.

On 12 July 1994 this court issued a ruling:

In the proceedings on the dispute over the deployment of German forces the Federal Constitutional Court (Second Panel) has ruled that the Federal Republic of Germany is at liberty to assign German armed forces in operations mounted by the North Atlantic Treaty Organization (NATO) and Western European Union (WEU) to implement resolutions of the Security Council of the United Nations (UN). The same applies to the assignment of German contingents to peacekeeping forces of the UN.

...The Court also finds, however, after thoroughly analyzing the provisions of the Basic Law relating to the status of the armed forces in the constitutional system, that the Federal Government is required to obtain the Bundestag's ⁵ explicit approval for each deployment of German armed forces. Such approval must in principle be obtained prior to their deployment. The Bundestag must decide on the deployment of armed forces with a simple majority. Once parliament has given its approval, the decision on the modalities of deployment, especially the question of the size of the force and the duration of their deployment and on necessary coordination within and with the governing bodies of international organizations, falls within the government's sphere of competence. The nature and extent of parliament's involvement is for parliament itself to decide within the scope of these constitutional constraints.

...The ruling was sought by the SPD⁶ and FDP⁷ groups in the Bundestag.

With this decision the Federal Constitutional Court has legitimized the long-disputed admissibility of the deployment of German forces (*outside the NATO area*) under a United Nations mandate but at the same time made their deployment in each individual case subject to the approval of the German Bundestag.⁸

Can German forces now be employed outside of the NATO area? Will they? What criteria will be used to decide? How will Germany approach these issues? To analyze the impact of the Constitutional Court ruling on German security decision making, this paper examines questions proposed by strategist Dr. Crowl⁹.

Implications of the Ruling

General Naumann, the Chief of Staff of the German Armed Forces, commented shortly after the ruling that:

Germany's 1949 Constitution does not prohibit participation in multilateral peacekeeping or combat operations, and that German troops are permitted to join military missions abroad if parliament approves. With that finding, German foreign policy has regained sovereignty, freeing Germany to act fully in concert with other members of the community of nations to which it belongs and to accept the burdens that go along with such an international role.¹⁰

In fact with the unification of Germany on 3 October 1990 and the termination of all World War II victors' rights, Germany had already regained full sovereignty, and was hindered from participation in international military affairs only by its own internal political and legal process.

One could get an ambiguous impression of the German Constitutional Court ruling by reading the newspapers shortly after the decision. Politicians announced that from now on participation of German soldiers in joint operations would be legal. These statements were misleading, because operations of that kind have in fact always been legal. Thus, since many politicians' interpretations of the German Basic Law were flawed, their policy positions articulated to the people and the allies have mislead both.

Now, after the ruling of the High Court, German politics face a new challenge. "Gone are the days when they could hide behind a strict interpretation of the constitution that was held to circumscribe severely German participation in UN and NATO operations."¹⁰

Gradually certain criteria will be developed to decide when and where and to what extent German soldiers will be part of multilateral military missions. Philip A. Crowl suggests

questions that "strategists must ask before they commence a war, before they take actions which might lead to war, before they undertake a wartime campaign, or before they end a war in which they are already engaged. This paper uses Crowl's questions to analyze Germany's security situation after the ruling of the High Court.

Crowl's questions are as follows:

1. What is it about?

Even with a relatively secure peace and a promising policy of détente between West and East in Europe every larger state has to rely on armed forces, not only to counter a possible threat but much more as an attribute of sovereignty and the national independence which it is supposed to protect.

The German armed forces, the Bundeswehr, serves as a striking example. Without its military contribution to NATO or within the West European community Germany's goal to regain full sovereignty and equal rights within the international political environment would have been highly optimistic if not unattainable. Whether the Bundeswehr will be as significant for the Federal Republic's future as it was during the 45-year Cold War largely depends on the development of the security interests and the security policy of the western alliances and Germany's role within this process. Today, though, one statement can be made:

"Every Western European member state has to make a military contribution towards a common defense and security system. The means to fulfill this obligation will be the national armed forces."¹¹ Therefore the Bundeswehr has to be a responsive instrument of Germany's foreign and security policy, able to share future burdens equally with other allied forces.

According to Article 24(2) of the Basic Law, the federation may become a party to a system of collective security and in so doing consent to limitations upon its sovereign powers. The Federal constitutional Court also sees in this power conferred by the Basic Law the constitutional foundation for an assumption of responsibilities that are typically associated with membership of such a system of collective security. Hence German servicemen may be deployed within the scope of UN peacekeeping missions even if the latter are authorized to use force. The objections submitted by the applicants (SPD and FDP) on constitutional grounds to the participation of German forces in the UNOSOM II mission in Somalia, in the NATO/WEU naval operation in the Adriatic to monitor the UN embargo on the Federal Republic of Yugoslavia, and in the AWACS monitoring of the ban on flights in the airspace over Bosnia-Herzegovina, likewise imposed by the United Nations, are therefore rejected. German servicemen may also be integrated into NATO formations which are deployed within the framework of UN operations. This, according to the Court, is covered by parliament's approval of Germany's accession to NATO and the UN Charter.¹²

Immediately after the ruling of the High Court on 12 July 1994 the German government asked the parliament for approval of the missions of German soldiers in Southeast Europe. In turn the parliament interrupted its summer recess and convened a special session.

After the constituent resolution the cabinet decided to lift the German restrictions as of 27 July, so that the rules of engagement and operations orders of responsible NATO commanders could be followed in toto. That means that German AWACS members can be employed in the Hungarian orbit and German ships may operate in the Montenegrin operations area including the territorial sea of Albania and Montenegro now to participate in "stop and search".¹³

Thus the German Chief of Staff sees a clear signal from the German government to become a mature partner in shared responsibilities.

The ruling of the Constitutional Court definitely answered Crowl's first question, "What is it about?" *It is about* Germany's sovereignty, the nation's international obligations and the new role of its armed forces.

2. Is the military strategy tailored to meet the national political objectives?

The current worldwide security situation including

- the United States' role as the only world power of unrestricted global action,
- Western Europe's and Japan's economic problems and challenges,
- the relatively unstable political landscape in Eastern Europe and Russia,
- the controversies of the multipolar world of the 21st century with powerful centers in the northern hemisphere, called to help the south to solve their problems, as well as
- Germany's role as an ally and a continental middle power with world - wide economic interests

are the foundation for the national objectives and consequently national military strategy.

The mission and structure of the Bundeswehr are being tailored to match this strategy. In a speech, delivered at the Royal United Services Institute for Defense Studies, London, on 21 October 1994, General Naumann stated:

The primary task of the Federal Armed Forces will continue to be the protection of Germany from external threats. But in accordance with the new political requirements, the German armed forces must now (*in particular after the ruling of the High Court*) also be available as a flexible instrument for peacekeeping and crisis management. ...

...(Consequently) the armed forces cannot be structured for only one concrete scenario, as in the past. Part of the Bundeswehr must be able to respond to a broader spectrum of options.

Another part of the Bundeswehr, that is by far the largest part, must after a longer preparation time be able to secure the protection of our country through Alliance defense.¹⁴

This means that three categories of forces must be available:

1. The main defense forces (MDF) comprise all the augmentable and standing forces that would be employed in defense of Germany and its Allies. The augmentable elements of the main defense forces are the foundation of national defense. They are to be kept at graduated levels of readiness and must be augmentable, so that they can establish operational readiness within the time available to make military preparations for national and Alliance defense. They are composed of active duty personnel and, to an even greater extent than before, reservists of all ranks who receive basic and continuation training during their active military service and periods of reserve duty training. Selected units of standing MDF, particularly from the logistic and medical corps, will be employed in support of the reaction forces.
2. The reaction forces (RF) are those elements of the armed forces that can be employed for conflict prevention and crisis management within the Alliance framework and as a contribution to international peace missions. As standing defense forces, they contribute to national defense and protect the augmentation of the mobilization-dependent MDF. If necessary, they can receive specific support from augmentable elements or from forces of the basic military organization.
3. The "basic military organization" - that is the infrastructure, required to exercise command and control, to support the operation of the armed forces, to discharge training and service support functions, to perform civil-military cooperation tasks, and to support the Alliance forces stationed in Germany.¹⁵

So, the Bundeswehr is being restructured to make certain it matches the new military strategy.

3. *What are the limits of military power?*

"Germany's ability to act strategically is not only a political and mental challenge. It is also a question of military capabilities and options."¹⁶

Both elements, the political and mental challenge as well as the military capabilities and options divide the above question into two. Consequently two answers have to be given.

First, to the question of the impact of the political and mental situation on the use of military power. Part of the answer was given in the *Frankfurter Allgemeine Zeitung* on 13 July:

To be sure, the Federal Constitutional Court's decision on sending Bundeswehr troops outside the territory of NATO does not give the government, any government, a free hand in using the Bundeswehr. The decision adheres closely to the instances at hand: the Adriatic, AWACS, Somalia. But the decision also says, and this points to the future, that the collective security systems the Federal Republic has joined - the United Nations foremost, but also NATO and the Western European Union - can change in character, as we have seen since 1989....¹⁷

The *Süddeutsche Zeitung*, *Munich* added the same day:

...Foreign minister Kinkel has already warned that the restraint in military matters (practiced) up to now should not be 'relinquished hysterically'. He has good reasons for that warning: legally there will be only a single absolute prohibition in the future - the prohibition against wars of aggression as identified under international law. With this decision from Karlsruhe, the most consequential struggle since the 1955 debate over rearmament (*of the Federal Republic of Germany*) comes to an end. The decision changes Germany's entire foreign and military policy.¹⁸

Germany is preparing its military to meet its future greater responsibilities and to share the risks with its Alliance partners to protect world peace and save threatened lives. German participation will not, of course, be automatic but will always be based on the national values and interests, since there is no obligatory norm within international law. As General Naumann

commented, "Of course, Germany will continue to exercise great restraint in the use of military power, and for good reasons. I think it would send the wrong signal if Germany now prepared to acquire forward projection capabilities, which its armed forces currently do not have. In fact, our long-term planning does not include such a step."¹⁹

Thus, the second part of the question regarding Germany's military capabilities and options can be answered.

Germany's Federal Minister of Defense, Volker R  he, said during a Conference of the Aspen Institute on 24 August 1994 in Berlin:

Today, the Bundeswehr is still best prepared for the most unlikely case - an aggression against NATO. It is least prepared for the most likely case - the new tasks associated with international crisis management. For this reason the German government has initiated a fundamental reform of the German armed forces that will give them the necessary shape to master the challenges of today and tomorrow. ... The main emphasis of the reform will be the build-up of highly professional reaction forces with a high degree of readiness and availability, and able to cover the entire spectrum of crisis management tasks.²⁰

The fundamental changes in the general condition necessitate a new approach to armed forces equipment planning. At the moment the Bundeswehr is adequately equipped for national defense at home, since the main defense forces have predominantly modern equipment at their disposal.

For the near future the high value attached to the crisis reaction capability determines the principal requirements for the equipment of the Bundeswehr. Priority is being given to equipping the reaction forces for international crisis management operations. Enlarged reconnaissance capabilities are needed as well as internationally interoperable communications, command, control, and information systems for disseminating information quickly through

several echelons of command. Steps must be taken to provide logistic and medical support for units engaged in crisis management operations, international peace missions and humanitarian aid activities.¹⁶ Germany has neither the intention nor the resources to engage in unilateral military operations of any kind, and thus needs coordinated action that involves its major allies to share common burdens and responsibilities.

4. What are the alternatives?

Decisions with regard to national security are made in conjunction with national objectives and national military strategy, i.e. the protection of Germany from external threats and participation in peacekeeping and crisis management operations within the framework of the United Nations. The only means to put such decisions into effect are military forces.

There are a certain number of people in Germany driven by a political party that wants NATO and the Bundeswehr to disappear entirely. This, however, cannot be considered to be a viable alternative to the current political position without losing credibility, sovereignty, and the freedom of action within the international political environment. Consequently there is no serious alternative to carrying out the decisions made in pursuance of the stated national security interests and objectives.

Alternatives, however, should be worked out and defined before executing military operations. This is of particular importance when conducting crisis management operations. The Bosnia-Herzegovina conflict shows very clearly the entire spectrum of alternatives that UN and NATO decision makers have to take into consideration prior to the use of military force. The variety of alternatives ranges from simply demonstrating military readiness, to embargo as

an economic sanction, to blockade, to containment, and finally to military intervention as the last resort.

These are the kind of decisions that, after the ruling of the Constitutional Court, German politicians will have to make in the future. The alternatives, therefore, will no longer be "are we or are we not *allowed* to participate?" but rather "do we or do we not *want* to participate?" in military operations within the UN and NATO frameworks.

This new and unaccustomed situation, "despite the clear wording of the Karlsruhe decision, will cause domestic conflicts over the new role of the Bundeswehr in international crisis management to continue."²²

In consequence it leads directly to the next of Crowl's questions.

5. How strong is the home front?

For the German people (*the ruling of the High Court*) means an enormous psychological adjustment. The Federal Republic never was a power of military intervention like the United States, England, or France. Two lost wars have taken away the pride in military performance. It took a great deal of trouble to accept the Bundeswehr's defensive mission throughout the last four decades. Therefore it will be very hard to achieve general approval for worldwide operations with German participation.²³

Not only the German people and those who have to make the decisions, but first of all the German soldiers will have to adjust to the new situation. They will have to adopt a new way of seeing themselves. This process, including the people, the parliament, and the soldiers, will take time. A general consensus about the Bundeswehr and its new role and mission lies yet in some distant future.

On the other hand, recent polls indicated that there is growing support among Germans for UN peacekeeping operations and for sharing responsibilities with other nations. Public opinion regarding the ruling of the Constitutional Court was overwhelmingly supportive, with a general feeling that the Court had judged wisely. No further legal hairsplitting - the politicians and the press pointed out that normality finally had reached Germany, which was not privileged any longer. National security decision making has now been shifted to the appropriate council, and the answers to international problems are now to be given by elected politicians, not by lawyers and judges.²⁴

The results of the October 1994 parliamentary elections, returning to office the Kohl government which had supported the participation of the Bundeswehr in UN operations outside the NATO area, indicate that the German voters agree with this broader international role.

Conclusion

Germany's Constitutional Court's ruling of 12 July 1994 will have a significant impact on its national security decision making. Despite the fact that the ruling itself was not a security decision as such, it paved the way from Germany's privileged and special position to normality. It underlined the supremacy of parliament over the military and put the entire responsibility for Germany's foreign and security policy on the political leadership which is now challenged to decide when and to what extent the Bundeswehr is going to participate on WEU, NATO and UN operations. The formal clarification of Germany's Basic Law eliminated the question whether or not Germany's armed forces are *allowed* to be employed outside NATO territory to share the burdens of crisis management and humanitarian relief together with its allies. Without question, in today's German political situation the ruling of the High Court can be considered a historic

decision, although politicians could have made it superfluous by achieving consensus on the interpretation of the Basic Law years ago.

German participation, however, is not automatic. Each mission must be decided on individually, based on national values and interests. The Chief of Staff of the German Armed Forces has posed his own set of questions which in many ways parallel Crawl's:

- First, is it in our interest?
- Second, are the objectives of a given operation achievable?
- Third, can the operation be delimited before it is begun?
- Fourth, are the costs - and not only in financial terms - calculable and acceptable?²⁵

It is noteworthy that America's Secretary of Defense during the Reagan administration, Caspar W. Weinberger, posed similar questions. Their restraining rather than enabling character clearly emphasizes the intention to use military force only as a last resort.

While General Naumann's list does not explicitly include one of Crawl's questions, perhaps the most important one in determining future German participation in multinational operations - "How strong is the home front?" The German political and military leadership is clearly aware that it can only act with the approval and support of Germany's population.

Notes

1. Germany is a member state of the Western European Union (WEU) which is planned to become an integral part of the European Union and turn it into its defense component. The aim of the WEU is "to afford assistance to each other, in accordance with the Charter of the United Nations, in maintaining international peace and security and resisting any policy of aggression." The parties to the Treaty express their will to promote the unity and encourage the integration of Europe. The core of the WEU Treaty is the article under which the allies pledge to render mutual assistance if one of them should be the object of an armed attack in Europe. The WEU allows the Europeans to assume greater responsibility for their security and to be capable of taking action in contingencies where NATO does not commit itself.

2. German MOD - Navy Staff, III 2, (Bonn, Germany, October 1994)

3. The restrictive interpretation of the Basic Law did not prohibit the rise of military forces for humanitarian purposes. German soldiers are providing humanitarian support since more than 30 years, comprising over 120 missions in 53 countries all over the world.

As a member state of UN Germany participated on six operations since 1990.

These operations are:

- Minesweeping operations in the Gulf,
- UNSCOM, (United Nations Special Commission in Iraq) inspection and weapons destruction program,

- UNTAC, (United Nations Transitional Authority Cambodia) provide medical support and operate a general hospital in Phnom Penh,
- UNPROFOR, (United Nations Protection Force in Ex-Yugoslavia) including airlift to Sarajevo, control of the embargo in the Mediterranean, AWACS missions to control the "no-fly-zone" over Bosnia-Herzegovina,
- UNOSOM II, (United Nations Operations in Somalia) airlift operations for the immediate delivery of food for the people of Somalia and logistic support for a brigade,
- UNOMIG, (United Nations Observer Mission in Georgia) military observers and medical support.

4. The main task of the Constitutional court is to decide questions of constitutional law and to settle disputes in constitutional matters. Its function is to enforce the basic principles laid down in the constitution and to safeguard the constitution against possible violations by state institutions. Unlike the Supreme Court in the United States which can avoid adjudicating the constitutionality of certain political matters according to the "political question doctrine", the German Constitutional court is bound to uphold the constitution even if this may undermine the authority of the parliament.

5. The German Bundestag is the parliamentary assembly representing the people of the Federal Republic of Germany. It is elected by the people every four years. It may only be dissolved prematurely under exceptional circumstances, the final decision lying with the Federal President. The Bundestag's main functions are to pass laws, to elect the Federal chancellor, and to keep track on the government.

6. SPD, Social Democratic Party of Germany, a recreation of the former mainly labor-oriented party of the same name. Currently in opposition.

7. FDP, Free Democratic Party, adopted programs in the tradition of German liberalism. Currently in coalition with the ruling parties Christian Democratic Union of Germany, CDU, and the Christian Social Union, CSU.

For decades neither political parties in the Bundestag nor public opinion were able to achieve consensus on the limits on the Bundeswehr's area of deployment and the scale of its participation in UN and NATO missions. The reason was the contrasting interpretation of Germany's Basic Law (Grundgesetz). Article 87a -added after rearmament in the 1950s- states that the armed forces serve "defensive purposes," and "apart from defense ... may only be used to the extent explicitly permitted by this Basic Law." Article 24 expressly permits the Federal Republic of Germany to enter "a system of mutual collective security" in order to bring about "a peaceful and lasting order in Europe and among the nations of the world." Article 25 gives international law precedence over national law.

In the past years it has been customary to interpret the Basic Law narrowly by defining "defensive purposes" as protection of German territory against attack, which would exclude military activity beyond national borders. Exponents of this view, particularly those in the political parties which took this situation to the High Court, agree that Germany may enter collective security arrangements, but only where these are consistent with the Bundeswehr's defensive purpose. NATO fits this criterion, and German forces may take part in Alliance operations, but, they insist, such operations are restricted by the North Atlantic Treaty to areas north of the Tropic Cancer. Taking part in multilateral peace keeping or peace enforcement missions would require amending the Basic Law by a two-thirds majority in parliament.

Many constitutional scholars and military officials, as well as the currently ruling political parties disagreed. They claim Basic Law Article 87a on the Bundeswehr's "defensive

purposes" was not meant to bar action outside national borders - something international law and the UN Charter permit in the name of self-defense - but to ensure that the armed forces would never be used in quelling *domestic* disorder. In any case, they argue, Article 87a permits the Bundeswehr's tasks "aside from defense" when covered by another clause of the constitution, thus plainly sanctioning the "collective security" arrangements mentioned in Article 24. Under Article 25, they add, Germany is obliged to uphold international law. For these reasons they always considered it constitutional, and in some cases obligatory, for Germany to participate in the actions of collective organizations to which it belongs - the UN, WEU and NATO.

(Compare: Clemens, Clay, Opportunity or Obligation? Redefining Germany's Military Role Outside of NATO. in ARMED FORCES & SOCIETY, Vol. 19, No. 2, Winter 1993, pp. 232).

8. Press release issued by the Federal Constitutional Court, No. 29/94, (Karlsruhe, Germany).

9. Professor Philip A. Crowl received his Ph.D. from Johns Hopkins University in 1942. He taught at the U.S. Naval Academy, Princeton University, and the University of Nebraska where he was Chairman of the Department of History. He also served as a naval officer during World war II, as a historian in the Office of the Chief of Military History, Department of the Army, and as an intelligence officer in the Department of State. Since 1972 he has headed the Naval war College's Department of Strategy as the Ernest J. King Professor of Maritime History. His best known works include *Maryland During and After the revolution*, *Campaign in the Mariannas*, *Seizure of the Gilberts and Marshalls*, and *The U.S. Marines and Amphibious War*.

10. General Klaus Naumann, COS German Armed Forces, address on the occasion of a round table at the Konrad Adenauer Foundation, (Washington D.C., 15 July 1994).

11. Lothar Rühl, in "Sicherheitspolitik kontrovers", Band II, (Bonn, Germany 1990), pp. 410.

12. Press release issued by the Federal Constitutional Court, No. 29/94, para 2, (Karlsruhe, Germany).

13. German MOD - Navy Staff, III 2, (Bonn, Germany, October 1994)

As of 18 October a total of 27 search missions by German ships are reported, which clearly indicates the beginning of a new era of German cooperation in international security affairs.

14. German Federal Ministry of Defense, White Paper 1994, (Bonn, Germany, 05 April 1994), p. 89.

15. *Ibid.*

16. Volker Rühe, German Federal Minister of Defense, luncheon address on the occasion of the Conference of the Aspen Institute on 24 August 1994 in Berlin, Germany.

17. *Frankfurter Allgemeine Sonntagszeitung*, 17 July 1994.

18. *Süddeutsche Zeitung*, (Munich), 13 July 1994.

19. General Klaus Naumann, COS German Armed Forces, address on the occasion of a round table at the Konrad Adenauer Foundation, (Washington D.C., 15 July 1994).

20. Volker Rühe, German Federal Minister of Defense, luncheon address on the occasion of the Conference of the Aspen Institute on 24 August 1994 in Berlin, Germany.

21. German Federal Ministry of Defense, White Paper 1994, (Bonn, Germany, 05 April 1994), pp. 99.

22. *Dresdener Neueste Nachrichten* (German newspaper), 13 July 1994.

23. Karl Feldmeyer, in *Frankfurter Allgemeine Sonntagszeitung*, 17 July 1994.

24. German MOD - Navy Staff, III 2, (Bonn, Germany, October 1994)
25. General Klaus Naumann, COS German Armed Forces, address on the occasion of a round table at the Konrad Adenauer Foundation, (Washington D.C., 15 July 1994)